Supreme Court, U.S.
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No.01-____

IN THE

Supreme Court of the United States

NEW YORK ASSOCIATION OF CONVENIENCE STORES, NATIONAL ASSOCIATION OF CONVENIENCE STORES, and M.W.S. ENTERPRISES, INC.,

Petitioners,

v.

ARTHUR J. ROTH, COMMISSIONER OF THE DEPARTMENT OF TAXATION and FINANCE OF THE STATE OF NEW YORK, and THE DEPARTMENT OF TAXATION and FINANCE OF THE STATE OF NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether laws or policies that single out Native Americans for special treatment must be rationally related to "Congress' unique obligation toward the Indians" to satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

The petitioners are the New York Association of Convenience Stores, the National Association of Convenience Stores, and M.W.S. Enterprises, Inc. who also were parties to the proceedings below. Sugarcreek Stores, Inc. also was a party to the proceedings below but is not participating in this proceeding because it sold many of its assets and changed the nature of its business, and therefore no longer retains an interest in these proceedings.

The Respondents are Arthur J. Roth, Commissioner of the Department of Taxation and Finance of the State of New York, and the Department of Taxation and Finance of the State of New York. Michael H. Urbach, the then-Commissioner of the Department of Taxation and Finance of the State of New York, and the Department of Taxation and Finance of the State of New York were parties in the proceedings below. Because Mr. Roth replaced Mr. Urbach as Commissioner, he has been substituted as the named Commissioner Respondent herein. *Cf.* Supreme Court Rule 35.3.

RULE 29.6 STATEMENT

Petitioner New York Association of Convenience Stores does not have a parent company nor does any publicly held company own 10% or more of its stock.

Petitioner National Association of Convenience Stores does not have a parent company nor does any publicly held company own 10% or more of its stock.

Petitioner M.W.S. Enterprises, Inc. does not have a parent company nor does any publicly held company own 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners New York Association of Convenience Stores ("NYACS"), National Association of Convenience Stores ("NACS"), and M.W.S. Enterprises, Inc. (collectively "Petitioners") respectfully request that this Court issue a writ of certiorari to review the judgment of the New York Court of Appeals.

OPINIONS BELOW

The decision of the New York Court of Appeals denying leave to appeal was entered on July 2, 2001; is not published; and is reproduced in Appendix A to this Petition ("Pet. App. A") at 1a. The opinion of the New York Appellate Division, Third Department, the last substantive decision in this case, was entered August 3, 2000; is reported at 712 N.Y.S.2d 220; and is reproduced at Pet. App. B at 2a. The opinion of the New York Court of Appeals setting the standard of review and remanding to the New York Supreme Court was entered on July 9, 1998; is reported at 699 N.E. 2d 904; and is reproduced at Pet. App. C at 6a. The opinion of the New York Appellate Division, Third Department initially addressing the standard of review was entered on May 8, 1997; is reported at 658 N.Y.S.2d 468; and is reproduced at Pet. App. D at 16a.

JURISDICTION

The first opinion of the New York Court of Appeals was issued on July 9, 1998, and this case then was remanded to the New York Supreme Court. Following an appeal of the ensuing New York Supreme Court decision, the opinion of the New York Appellate Division, Third Department was issued on August 3, 2000. A timely motion for leave to appeal the August 3 decision was denied by the New York Court of Appeals on July 2, 2001. This Court has jurisdiction under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of sections 282, 282-a, 282-b, 282-c, 284, 284-a, 284-c, 285, 285-a and 285-b of Article 12-A of New York State Tax Law are set forth at Pet. App. F at

29a. Relevant provisions of sections 470, 471, 471-a, 471-b, 471-c, 471-d, 474 and 481 of Article 20 of the New York State Tax Law are set forth at Pet. App. G at 59a. Relevant provisions of sections 1101, 1102, 1103 and 1116 of Article 28 of the New York State Tax Law are set forth at Pet. App. H at 79a. Relevant provisions of sections 1814, 1846 and 1847 of Article 37 of New York State Tax Law are set forth at Pet. App. I at 92a. Section 1 of the Fourteenth Amendment of the United States Constitution is set forth in full at Pet. App. E at 28a.

STATEMENT OF THE CASE

The New York state court's final decision in this case and the District of Columbia Circuit's decision in *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998) are squarely in conflict with the Ninth Circuit's decisions in *Williams v. Babbitt*, 115 F.3d 657, 664 (9th Cir. 1997), and *Alaska Chapter, Associated General Contractors of America, Inc. v. Pierce*, 694 F.2d 1162, 1163 (9th Cir. 1982), with the Fifth Circuit's decision in *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991), with the Eighth Circuit's decision in *United States v. Aanerud*, 893 F.2d 956, 961-62 (1990), with the Vermont Supreme Court's decision in *In re A.J.*, 733 A.2d 36, 38 (Vt. 1999), and with the Maine Supreme Court's decision in *In re Marcus S., et al.*, 638 A.2d 1158, 1159 (Me. 1994). The Court's decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), has exacerbated the disagreements among these courts.

The issues presented here are of significant importance to Native Americans, to businesses that compete with Native American businesses, and to States with Native American tribes located within their borders, and are likely to continue to arise. Accordingly, this case presents issues

worthy of review by this Court. For these reasons, Petitioners urge the Court to resolve the conflict by granting this Petition for a Writ of Certiorari.

A. The Issue Presented

Multiple States have imposed sales taxes on the purchase of cigarettes and motor fuels, including purchases made on reservations by non-Native Americans. At issue in this case is the New York Department of Taxation and Finance's decision not to enforce against Native American retailers and suppliers the State's own laws imposing taxes on all purchases of cigarettes and motor fuels that the State has the power to tax – including on-reservation purchases by non-Native Americans.

The New York courts below upheld the Department of Taxation and Finance's decision not to enforce the statutorily mandated sales tax requirements, based on the holding that laws that single out Native Americans for special treatment survive scrutiny under the Equal Protection Clause of the Fourteenth Amendment if they further any identifiable government purpose under an ordinary rational basis test. The District of Columbia Circuit agrees that this is the appropriate test in this context. The cited decisions of the Fifth, Eighth and Ninth Circuits and the Vermont and Maine Supreme Courts are squarely in conflict with the New York and District of Columbia Circuit decisions, as these courts instead have held that such laws survive equal protection scrutiny only if they are "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

B. Taxation of Sales on Reservations – An Historical Perspective

Native American retailers historically have resisted the imposition of state taxes on cigarette and motor fuel sales, have aggressively marketed their exemptions from state taxation and, because of these exemptions, thus have been able to sell cigarettes to non-Native American purchasers at very low prices. As in this case, a number of States have found that non-Native American purchasers of cigarettes and motor fuels circumvent the imposition of sales taxes by making their purchases on reservations. The result not only has been lost tax revenue to the State, but also lost revenue by businesses located off the reservations. In the past, New York has estimated annual losses of $102 million in sales tax revenue from on-reservation purchases. Current losses are almost certainly higher than New York's past estimates because, in 1999, the State increased its cigarette tax from 56 cents to $1.11 per pack of twenty cigarettes. Tax Law § 471(1), as amended by 1999 N.Y. Laws ch. 1, Pet. App. G at 62a. In New York, the incidence of non-Native Americans traveling to reservations to purchase cigarettes and motor fuel for which State taxes have not been paid has been called the State's "single largest form of tax evasion." James W. Wetzler, then-Commissioner of the Department of Taxation and Finance, *quoted in*, Dana Milbank, *Native Americans' State Tax Breaks Provoke Disputes*, Wall St. J., July 20, 1992, at B2.

The Court has, on multiple occasions, addressed the question of the limits on the power of States to impose taxes on activities that occur on Indian reservations. *See, e.g.*, *Dept. of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 65 (1994); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) ("*Potawatomi*");

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980) ("*Colville*"); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). In *McClanahan*, a member of the Navajo tribe living on the reservation challenged Arizona's income tax as it applied to her. The Court struck down the tax, which applied to income earned from on-reservation activity. *McClanahan*, 411 U.S. at 181. The Court distinguished a State's power to impose an income tax on Native Americans, however, from its power to regulate the activity of non-Native Americans on reservations. *Id.* at 168. The proper inquiry in the latter instance "'has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* at 172 (quoting *Williams v. Lee*, 358 U.S. 217, 219-220 (1959)).

Since 1973, the Court has further defined the limits on the States' power to tax on-reservation activities. For example, this Court has struck down State attempts to tax personal property located on the reservation, vendor license fees for retailers on the reservation, and cigarette sales taxes applying to "on-reservation sales by Indians to Indians." *Moe*, 425 U.S. at 480-481. The Court has repeatedly upheld, however, the imposition of State taxes on the purchase of cigarettes by non-Indians on reservations. *Milhelm Attea*, 512 U.S. at 78; *Potawatomi*, 498 U.S. at 514; *Colville*, 447 U.S. at 161; *Moe*, 425 U.S. at 483. The Court consistently has concluded that such taxes are imposed on non-Native Americans and impose only a minimal collection burden on Native American retailers. *See, e.g., Potawatomi*, 498 U.S. at 513-14; *Colville*, 447 U.S. at 138; *Moe*, 425 U.S. at 483.

The Court's decisions in this area culminated with its decision upholding the very New York tax statutes and

regulations at issue in this case. *Milhelm Attea*, 512 U.S. at 78. Even though the Court clearly and unanimously upheld the New York regulations implementing the State's cigarette sales tax with respect to on-reservation purchases by non-Native Americans, the State repealed the regulations on April 13, 1998, and now refuses to apply to Native American retailers and their suppliers the statutes requiring the enforcement of cigarette and motor fuel sales taxes through all wholesalers and retailers, including those who provide such products on reservations.

C. The State Law and Regulations at Issue

New York law imposes a sales tax on all cigarettes in the State except when the sale occurs "under such circumstances that this state is without power to impose such tax." N.Y. Tax Law § 471(1) (Consol. 2001), Pet. App. G at 62a-63a. Licensed agents purchase tax stamps and attach them to cigarette packs prior to the first sale in the State. The cost of the tax then becomes part of the full price of the cigarettes at each step in the distribution stream. The tax ultimately falls upon the consumer. *Id.* § 471(2), Pet. App. G at 62a. A willful attempt to "evade or defeat" the tax is a misdemeanor. *Id.* § 1814(a), Pet. App. I at 92a. The tax laws authorize enforcement of the cigarette tax through the imposition of monetary penalties on wholesalers or dealers who violate the laws, or through the seizure of cigarettes and any vehicle used to transport cigarettes on which taxes have not been paid in violation of the law. *Id.* §§ 481, 1846-47, Pet. App. G & I at 72a-78a, 98a-103a.

New York law also imposes excise and sales taxes on motor fuels (including diesel motor fuels). *Id.* §§ 282-a, 282-b, 282-c, 284, 284-a, 284-c, Pet. App. F at 34a-48a. The taxes on motor fuels operate in much the same way as the taxes on cigarettes. The taxes apply at the first non-exempt

sale that occurs in the State,[1] are passed through at each stage of the distribution process and ultimately fall upon the consumer. *Id.* §§ 282-a 4, 285-a 3, Pet. App. F at 38a, 52a.

The New York Department of Taxation and Finance (the "Department") issued regulations implementing New York's cigarette sales tax in 1988, which became effective on January 1, 1989. *See* N.Y. Comp. Codes R. & Regs. ("NYCRR") tit. 20, §§ 335.6 and 335.7, Pet. App. K and L at 108a, 115a.[2] The regulations included specific provisions addressing enforcement of the sales tax regulations against Native American retailers and their suppliers which provided that the Department would allow a quantity of untaxed cigarettes, based upon the probable demand of Indian consumers, to be sold to reservation retailers. NYCRR § 335.7(d)(1), Pet. App. L at 117a. The Native American-specific components of the regulations contemplated collection of the tax at the wholesale level before the cigarettes were transported to the reservation. *Id.* § 335.7 (b)(2), Pet. App. L at 116a. In the alternative, a tribe was permitted to enter into an agreement with the State to regulate the distribution of untaxed cigarettes on its reservation in an amount to be agreed upon between the tribe and the State. *Id.* § 335.7(c)(1), Pet. App. L at 116a. No such agreements were implemented here prior to the repeal of the regulations.

The motor fuels regulations also included Native American-specific provisions which set forth a scheme similar to that used for cigarettes. Under these regulations,

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[1] The exemptions include sales of fuel for purposes such as heating, generating electricity, and farming. *Id.* § 282-a 3(b).

[2] Effective December 19, 1990, 20 NYCRR 335.6 and 335.7 were renumbered 20 NYCRR 336.6 and 336.7 without any substantive change. This brief will cite only to the original numbering.

untaxed motor fuels could be sold to tribal retailers in amounts based on the probable demand of Indian consumers. *Id.* §§ 414.6, 414.7, 435.1, 435.2.

D. The *Milhelm Attea* Decision

In *Milhelm Attea*, this Court reversed a decision of the New York Court of Appeals in which that court had held that New York's cigarette sales tax provisions ran afoul of the federal Indian Trader Statutes, 25 U.S.C. §§ 261 *et seq.* The Court of Appeals attempted to distinguish this Court's prior decisions allowing the imposition of such taxes by reasoning that, because New York's regulations imposed taxes at the point of sale from a wholesaler to an Indian retailer, the regulations imposed too heavy a burden on Indian traders and, therefore, must be pre-empted by the Indian Trader Statutes. *Milhelm Attea*, 425 U.S. at 68-69.

Relying on all of the cases stretching back to *McClanahan*, the *Milhelm Attea* Court held that such regulations must be evaluated with an eye toward "reconcil[ing] the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." *Milhelm Attea*, at 73 (*quoting McClanahan*, 411 U.S. at 165). This inquiry requires the exercise of State authority to be examined in light of the state, federal and tribal interests at stake. *Id.* at 73. Conducting this inquiry, the *Milhelm Attea* Court concluded "that New York's decision to stanch the illicit flow of tax-free cigarettes early in the distribution stream is a 'reasonably necessary' method of 'preventing fraudulent transactions,' [and] one that 'polices against wholesale evasion of [New York's] own valid taxes without unnecessarily intruding on core tribal interests.'" *Id.* at 75 (*quoting Colville*, 447 U.S. at 160, 162). The *Milhelm Attea* Court made a similar determination with respect to each

challenged aspect of New York's regulatory scheme and, with respect to each, found that the State was entitled to collect taxes in the manner proposed. *Id.* at 75-78.

E. Proceedings Below

Following issuance of the *Milhelm Attea* decision in June 1994, the Department, rather than enforce the State's tax laws, conducted negotiations with Indian tribes seeking agreement on the quantities of untaxed cigarettes that would be made available to reservation retailers. In August 1995, Petitioners filed suit in the Supreme Court of New York seeking an order compelling the Department to enforce the tax laws on the grounds that the failure to enforce such laws only against Native American retailers and their suppliers violated the Equal Protection Clause of the Fourteenth Amendment.

1. *The Petitioners*

Petitioner National Association of Convenience Stores is a not-for-profit trade association representing the interests of 2,300 retail company members with over 77,000 stores that sell cigarettes, motor fuel and other products throughout the United States and internationally. Petitioner New York Association of Convenience Stores is a not-for-profit trade association representing the interests of over 3,000 convenience stores in the State of New York that sell cigarettes and motor fuel taxed by the State, as well as other products. Petitioner M.W.S. Enterprises, Inc. is a New York corporation that owns and operates thirty-four convenience stores in the State of New York that sell cigarettes and motor fuel taxed by the State, as well as other products. Twelve of these convenience stores are located in close proximity to Indian reservations and regularly compete with reservation retailers for business.

2. *The First Post-Milhelm Attea Round of Cases*

In their initial complaint in this case, Petitioners alleged that the Department's failure to enforce the tax laws against Native American retailers and their suppliers violated their right to equal protection under the Fourteenth Amendment because the differential enforcement of the tax laws was based on the suspect classification of race. The Department's differential enforcement has caused, and continues to cause, Petitioners to lose business to Native American retailers. Petitioners and their members lose tens of millions and perhaps hundreds of millions of dollars in sales each year due to the Department's differential enforcement. Following an increase in cigarette taxes from fifty-six cents to one dollar and eleven cents per pack that took effect in March 2000, off-reservation retailers reported drops in sales from thirty to sixty percent.

In response to the Petitioners' equal protection claims and their asserted severe economic injury, the Department contended that temporary suspension of enforcement was necessary "to ensure an opportunity for reservation businesses to survive, and to avoid disruptive and potentially violent demonstrations." *New York Ass'n of Convenience Stores v. Urbach*, 658 N.Y.S.2d 468, 471 (N.Y. App. Div. 1997) ("*NYACS I-A*"), Pet. App. D at 21a. At that point, the Department argued that suspending enforcement was a temporary measure in place while they negotiated a solution with the tribes. The Appellate Division held that these proffered reasons were not substantial enough to justify the Department's race-based policy of differential enforcement under a strict scrutiny equal protection analysis, and thus concluded that the Department's policy of non-enforcement

violated the Equal Protection Clause. *Id.* at 472, Pet. App. D at 22a.

In February 1997, while this case was pending before the New York Appellate Division, the Department announced that it would begin enforcement of the State's tax laws against Native American retailers and their suppliers on April 1, 1997. Interim agreements between the Department and certain tribes were reached prior to the date set for enforcement, but the Department began enforcement against other tribes on April 1. Enforcement included the interception of motor fuel and cigarette shipments bound for the reservations, inspection of those shipments and, in some cases, seizures of illegal shipments. These enforcement measures occurred off of the reservations. Some members of Indian tribes that were to receive these shipments reacted by blockading public highways, burning tires, confronting State Police, and threatening and committing acts of violence.

On May 22, 1997, fourteen days after the New York Appellate Division issued its decision, the Governor announced a cessation of the State's enforcement efforts and directed that the regulations implementing the taxes be repealed. The Department then sought and received review from the New York Court of Appeals. Several weeks after that appeal was argued – on April 13, 1998 – the State repealed the Native American components of the regulations. *See* New York Dept. of Taxation and Finance Order (April 13, 1998), Pet. App. J at 104a.

The Court of Appeals found that the repeal of the regulations indicated that the Department had embarked upon a new long-term policy of forbearance from collecting the taxes from Native American retailers and their suppliers. *New York Ass'n of Convenience Stores v. Urbach*, 699 N.E.2d 904, 909 (1998) ("*NYACS I-B*"), Pet. App. C at 13a.

The Court of Appeals then remanded the case to the Supreme Court for further consideration in light of the new Department policy. *Id.* at 909, Pet. App. C at 13a-14a.

In conjunction with issuing the remand, however, the Court of Appeals addressed the Appellate Division's ruling on the standard of review applicable to equal protection claims in this context, and found that the Department's differential enforcement was based not on race, but instead on concerns regarding tribal sovereignty and the restrictions imposed by the Indian Trader Laws. *Id.* at 908, Pet. App. C at 12a. The Court of Appeals concluded that, because the Department's policy was not based on race, it should be judged under an ordinary rational basis standard of review. *Id.*

3. *The Second Post-Milhelm Attea Round of Cases*

On remand, the New York Supreme Court applied the rational basis standard of review mandated by the Court of Appeals. *New York Ass'n of Convenience Stores v. Urbach*, 694 N.Y.S.2d 885, 888 (N.Y. Sup. Ct. 1999) ("*NYACS II-A*"). The Supreme Court found "implicit" in the Court of Appeals' decison the recognition that a long term policy of nonenforcement can have a rational basis, and thus rejected the argument that the non-enforcement policy exceeded respondents' discretionary powers. *NYACS II-A* at 889.

Petitioners sought review in the Appellate Division, which used the Court of Appeals-directed rational basis test to evaluate Petitioners' equal protection claims. *New York Ass'n of Convenience Stores v. Urbach*, 712 N.Y.S.2d 220, 222 (App. Div. 2000) ("*NYACS II-B*"), Pet. App. B at 4a-5a. Applying this test to the Department's policy, the Appellate

Division found that two reasons provided a sufficient basis for the Department's policy of non-enforcement – the need for cooperation by tribes to enforce the tax laws, which the State had been unable to secure, and the threat of civil unrest if the laws were enforced. *Id.* at 222, Pet. App. B at 5a. The Appellate Division reasoned that cooperation by tribes was required because reservation retailers could not be sued for their failure to collect the taxes and State auditors could not enter reservations to examine the required records without the cooperation of the tribes nor compel attendance at off-reservation audits. *Id.* The Appellate Division did not explain why these measures were needed in light of the fact that the regulations contemplated that the collection of the tax would occur at wholesale prior to transporting the goods to the reservation. *NYACS I-B*, 699 N.E.2d at 906, Pet. App. C at 6a-7a.

Petitioners' motion for leave to appeal to the Court of Appeals was denied on July 2, 2001. Accordingly, the Appellate Division's August 3, 2000 opinion is the last substantive opinion in this case.

REASONS FOR GRANTING THE WRIT

I. THERE IS A SQUARE CONFLICT AMONG THE CIRCUITS AND INVOLVING THREE STATE COURTS OF FINAL DECISION ON AN IMPORTANT QUESTION OF FEDERAL LAW.

There is a clear conflict between the New York Court of Appeals and the District of Columbia Circuit on the one hand, and the Fifth, Eighth and Ninth Circuits and the Maine and Vermont Supreme Courts on the other, regarding the appropriate level of scrutiny that applies when evaluating the constitutionality of laws that treat Native Americans differently from non-Native Americans. Specifically, the Fifth, Eighth and Ninth Circuits and the Maine and Vermont Supreme Courts have held that laws that single out Native Americans for special treatment survive scrutiny under the Equal Protection Clause of the Fourteenth Amendment only if they are rationally related to "Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974).[3] The District of Columbia Circuit and the New York state court both squarely disagree with these courts and instead employ an ordinary "rational basis" analysis to determine whether such laws are constitutionally permissible.

The New York Court of Appeals flatly held that the Department's policy of forbearance in enforcing the State's statutorily mandated sales tax collection requirements against Indians is "sustainable" if it satisfies a "'rational

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[3] The Second Circuit, in *dictum*, has signaled its agreement with this view. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 881 n.8 (2nd Cir. 1996) ("[l]egislation must be tied rationally to Congress' 'trust' obligations with respect to the welfare of Indian nations"), *cert. denied*, 519 U.S. 1041 (1996).

basis' standard." *NYACS I-B*, 699 N.E.2d at 908, Pet. App. C at 12a. In applying that standard, the New York Appellate Division explicitly characterized the "rational basis" test that it employed "as the lowest level of judicial review." *NYACS II-B*, 712 N.Y.S.2d at 222 (citation omitted), Pet. App. B at App. 4a-5a. The court's review of the Department's non-enforcement policy thus was based on the premise that "any reasonably conceivable state of facts that could provide a rational basis" for the Department's policy would insulate it from an equal protection challenge. *Id.*

Likewise, in *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998), the District of Columbia Circuit explicitly rejected the application of a more focused, less deferential level of scrutiny in favor of an ordinary rational basis analysis, holding that "ordinary rational basis scrutiny applies to Indian classifications just as it does to other non-suspect classifications under equal protection analysis." 158 F.3d at 1340. Thus, the court required the Narragansetts to demonstrate that their exclusion from the Indian Gaming Regulatory Act had "no rational relationship to any legitimate purpose," and flatly rejected their contention that the purpose had to be tied to the government's special obligation to Indians. *Id.* at 1340-41. Finding that the State's jurisdiction over gaming laws on its own was an "'appropriate' governmental purpose," the court found no equal protection violation. *Id.* at 1341-42.

In stark contrast, the Fifth, Eighth and Ninth Circuits and the Maine and Vermont Supreme Courts have held that legislation or other governmental action treating Native Americans differently must be evaluated through a lens that focuses specifically on whether the special treatment can be tied to the fulfillment of Congress' unique obligations toward the Indians. This test, which is derived from this

Court's decision in *Mancari*, 417 U.S. at 555,[4] constitutes a brand of scrutiny reserved for evaluating government regulations that affect Native Americans, as it is "rooted in the unique status of Indians as a 'separate people' with their own political institutions." *Williams v. Babbitt*, 115 F.3d 657, 664 (9th Cir. 1997), *cert. denied*, *Kawerak Reindeer Herders Ass'n v. Williams*, 523 U.S. 1117 (1998). As the Ninth Circuit views it, only "those statutes that affect uniquely Indian interests" are constitutionally permissible under the *Mancari* standard. *Id.* at 665 By definition, this level of scrutiny is less deferential than a naked rational basis analysis because it requires a nexus between the treatment at issue and a "uniquely Indian interest," as opposed to the more generalized "legitimate governmental interest" evaluated under traditional rational basis review.[5] *Id.* (noting

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[4] In *Mancari*, the Court upheld a preference for hiring Native Americans in the Bureau of Indian Affairs because it was reasonably and directly designed to further Indian self-government and thus constituted the fulfillment of Congress' unique obligation toward the Indians. 417 U.S. at 555.

[5] Several commentators have specifically distinguished the *Mancari* test from ordinary "rational basis" review. *See, e.g.*, L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702, 740 (2001) ("Congress can exercise its Commerce Clause authority without concern that racial preferences or race-related delegations of authority will be subject to strict scrutiny, but only so long as . . . the actions themselves are 'reasonably and rationally designed to further Indian self-government.'"); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 273 (1984) (the *Mancari* Court "applied more than minimal rationality scrutiny"). In this way, the level of scrutiny required under *Mancari* may be somewhat akin to the intermediate scrutiny that this Court has used to determine whether gender-based classifications violate the equal protection clause. *See, e.g., Tuan Anh Nguyen v. INS*, 121 S.Ct. 2053, 2059 (2001) ("For a gender-based classification to withstand equal protection scrutiny, it must be established at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the

that Indian-specific legislation may be upheld under this standard if it is specifically related to Indian land, tribal status, self-government and/or culture).

The Ninth Circuit consistently has based its equal protection inquiry in this context on whether the law at issue can be tied rationally to the "fulfillment of Congress' unique obligation toward Indians," and has upheld statutes as long as the law or policy at issue advances such interests in an identifiable way. *See Williams*, 115 F.3d at 665 (striking down a federal agency interpretation of the Reindeer Industry Act that would have prohibited nonnative entry into reindeer industry in Alaska in part because it was "unrelated to 'Congress' unique obligation toward the Indians'") (citation omitted); *Alaska Chapter, Associated General Contractors of America, Inc. v. Pierce*, 694 F.2d 1162, 1163 (9th Cir. 1982) (upholding subsidies to low income housing in remote Alaskan villages because they are "rationally related to the fulfillment of Congress' unique obligation toward Indians and Alaska Natives") (citation omitted); *United States v. Decker*, 600 F.2d 733 740-41 (9th Cir. 1979) (upholding statutes providing Indians with fishing rights promised by treaty), *cert. denied*, 444 U.S. 855 (1979).

Similarly, the Fifth and Eighth Circuits have held that equal protection challenges to laws that treat Native Americans differently from other groups must be reviewed in light of whether the disparate treatment furthers Congress' unique obligation toward the Indians, and not in terms of whether any legitimate governmental purpose whatsoever underlies such enactments. *See Peyote Way Church of God,*

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achievement of those objectives.") (citations and quotations omitted); *see also Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.")

Inc. v. Thornburgh, 922 F.2d 1210, 1216 (5th Cir. 1991) (upholding exemption because the preference at issue could "be tied rationally to the fulfillment of Congress' unique obligation toward the Indians") (quotation omitted); *United States v. Aanerud*, 893 F.2d 956, 961-62 (1990) (premising conclusion that no equal protection violation had occurred specifically on the fact that the Indian preference at issue was "sufficiently tied to 'the fulfillment of Congress' unique obligation toward the Indians'") (citation omitted), *cert. denied* 498 U.S. 822 (1990).

The Supreme Courts of Vermont and Maine likewise have held that the proper inquiry to determine the constitutionality of laws that treat Native Americans as a distinct class is whether the special treatment is rationally tied to the fulfillment of Congress' unique obligations toward Native Americans. *See In re A.J.*, 733 A.2d 36, 38 (Vt. 1999) ("[T]he appropriate standard in assessing the validity of such classifications is whether they are 'tied rationally to the fulfillment of Congress' unique obligation, toward the Indians.'") (citation omitted); *In re Marcus S., et al.*, 638 A.2d 1158, 1159 (Me. 1994) ("The proper inquiry in a determination of the constitutionality of such laws is whether the special treatment could be rationally tied to the fulfillment of Congress's unique obligation toward Indians.").

The New York courts' and District of Columbia Circuit's use of the less exacting pure "rational basis" standard to adjudicate an equal protection claim involving the treatment of Native Americans thus is squarely in conflict with the more precise standard employed by the Fifth, Eighth and Ninth Circuits and the Supreme Courts of Vermont and Maine. The latter jurisdictions have required that the treatment at issue be tied to a specific, predetermined interest – the fulfillment of Congress' unique obligation to

Native Americans; the former have been satisfied with something much less – "any reasonably conceivable state of facts that could provide a rational basis." *NYACS II-B*, 712 N.Y.S.2d at 222, Pet. App. B at 5a.

The Court's decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), appears to have exacerbated the confusion among the courts regarding the appropriate standard of review to apply to laws that use Native American classifications. Both the District of Columbia Circuit's decision in *Narragansett* and the Ninth Circuit' decision in *Williams* were issued after the *Adarand* opinion was issued in 1995. The District of Columbia Circuit, however, did not attempt to distinguish *Adarand* or to justify its application of the rational basis standard in light of the *Adarand* Court's application of strict scrutiny to *all* race-based classifications, including laws that single out Native Americans.[6] The Ninth Circuit, in contrast, discussed the impact of *Adarand* on *Mancari* at length, and questioned the continued viability of any test evaluating Native American classifications other than strict scrutiny in the wake of *Adarand*. *See Williams*, 115 F.3d at 665 ("The Supreme Court's recent decision in *Adarand* only adds to our constitutional doubts about" the constitutionality of policies that single out Native Americans for special treatment).

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[6] *See Adarand*, 515 U.S. at 244 (Stevens, J., dissenting) (citing *Mancari* and stating that the majority opinion's "concept of 'consistency' [in equal protection jurisprudence] . . . would view the special preferences that the National Government has provided to Native Americans since 1834 as comparable to the official discrimination against African Americans that was prevalent for much of our history").

II. THE COURT BELOW DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT.

Review of the decision below also is warranted because the final decision of the Appellate Division in this matter (which the New York Court of Appeals declined to review) involved important federal questions, and the court's resolution of those questions conflicts with decisions of this Court in at least two fundamental respects.

First, it conflicts with this Court's precedent by using a lower standard of judicial scrutiny than the one required for cases involving the special treatment of Native Americans. New York law requires the Department to deny delivery of tobacco and motor fuel shipments directed to retailers who are not in compliance with their sales tax payment obligations. *See* 20 NYCRR § 335.7(d)(6) (tobacco), Pet. App. L at 118a; *see also* 20 NYCRR § 414.7 (motor fuel). The Department's now official policy, however, is to refrain from enforcing this requirement if such retailers are Indians located on Indian reservations. *See* New York Dept. of Taxation and Finance Order (April 13, 1998) (repealing regulatory provisions enacted to implement tobacco and fuel tax collection procedures for products provided to Indian retailers and sold to non-Indians), Pet. App. J at 104a; *NYACS II-B*, 712 N.Y.S.2d at 221-22, Pet. App. B at 3a. The New York Appellate Division concluded that this non-enforcement policy does not violate the equal protection rights of non-Native American retailers because the Department allegedly has a rational basis for it – the prevention *off of the Indian reservations* of "civil unrest, personal injuries and significant interference with public transportation on the State highways" that Indians in New York perpetrated during the brief time when the

interception/seizure laws were enforced against them. *NYACS II-B*, 712 N.Y.S.2d at 222, Pet. App. B at 5a.

This holding squarely conflicts with this Court's primary holding in *Morton v. Mancari*, that laws and policies that "single[] out Indians for particular and special treatment" may be upheld only if "the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians[.]" 417 U.S. at 554-55. In *Mancari*, the Court found that the challenged employment practices that granted a hiring preference to Native Americans in the Bureau of Indian Affairs did not offend the Constitution because the practices were "reasonably and rationally designed to further Indian self-government[.]" *Id.* at 555. The Court recently reaffirmed the continued centrality of the rule that laws and policies singling out Indians for special treatment are constitutionally permissible only if they are reasonably and rationally designed to further Congress' "treaty obligations [or] its responsibilities to the Indian tribes" in some identifiable manner. *Rice v. Cayetano*, 528 U.S. 495, 519-20 (2000) (discussing the import of *Mancari*, 417 U.S. at 555).

The Appellate Division's reliance on a rational basis test under which the Department's non-enforcement policy would "'be upheld against equal protection challenges if there is any reasonably conceivable state of facts that could provide a rational basis,'" *NYACS II-B*, 712 N.Y.S.2d at 222, Pet. App. E at 5a (quoting *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993)), thus conflicts with this Court's clear directives in *Mancari* and *Cayetano* that policies and laws that single out Indians for special treatment will be

upheld only if they are rationally related to "Congress' unique obligation toward the Indians."[7]

Second, the New York Appellate Division opinion also conflicts with this Court's prior decisions sanctioning the tax collection methods at issue in this case. The New York court held that the Department had a rational basis for refusing to enforce the statutory sales tax collection requirements against Indian retailers directly on the grounds that, "[b]ecause of tribal immunity, the retailers cannot be sued for their failure to collect the taxes in question, and State auditors cannot go on the reservations to examine the retailers' records." *NYACS II-B*, 712 N.Y.S.2d at 222, Pet. App. B at 5a.[8] In *Potawatomi*, however, the Court indicated that, although States are precluded by sovereign immunity principles from bringing actions directly against a tribe, court actions for damages may be brought against "individual agents or officers of a tribe." 498 U.S. at 514; *see also Moe*,

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[7] In issuing its ruling, the Appellate Division also ignored the *Potawatomi* decision in which the Court made clear that "States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes . . . or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores." 498 U.S. at 514 (citations omitted). Moreover, as the Appellate Division recognized during its first review of this case following the issuance of this Court's decision in *Milhelm Attea*, 512 U.S. 61, unequal enforcement of laws to "protect citizens from civil disorder" violates the Equal Protection Clause, "save in those rare instances where civil disorder 'threaten[s] the very existence of the State.'" *NYACS I-A*, 658 N.Y.S.2d at 472 (quoting *Stotland v. Pennsylvania*, 398 U.S. 916, 920 (1970) (Douglas, J., dissenting)), Pet. App. D at 21a.

[8] For the reasons discussed above, this determination conflicts with prior decisions of this Court because it is based on the application of a "rational basis" standard of review that the Court has determined does not apply in this context. *See* Text at 21-23, *supra* (discussing *Mancari*, 417 U.S. 535, and *Cayetano*, 528 U.S. 495).

425 U.S. at 482-83 (sanctioning the use of collection methods such as those encompassed by the Department's now-repealed enforcement regulations). The decision below also ignores the New York statutory mandate requiring a tax to be paid "on all cigarettes possessed in the state by any person for sale," N.Y. Tax Law § 471(1), which this Court specifically determined did not constitute a violation of any Congressional policies with respect to Indians, *see Milhelm Attea*, 512 U.S. at 64,[9] and fails to consider any alternative enforcement mechanisms that may address the issues identified by the Department without implicating equal protection concerns.

III. RESOLUTION OF THESE SQUARE CONFLICTS IS ESSENTIAL.

The Court has made clear that no Congressional enactment or policy "goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in the State." *Colville*, 447 U.S. at 155. If the conflict among the courts and between the New York Court of Appeals and the decisions of this Court regarding the appropriate standard to apply to equal protection challenges involving Native Americans remains unresolved, however, there essentially will be no basis on which to challenge a state law or policy that singles out Native Americans for special treatment in jurisdictions in which the lower "rational basis" standard is applied. Non-Indian retailers in such jurisdictions thus will have no

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[9] The statute makes clear that the tax may not be applied where the State is without power to impose it – such as to on-reservation retail sales made to Indians. N.Y. Tax Law § 471(1). The *Milhelm Attea* Court specifically recognized this exemption in the course of upholding the application of the New York tax provisions to on-reservation cigarette sales made to non-tribe members. 512 U.S. at 64.

effective recourse against a State's failure to enforce statutorily mandated non-discriminatory sales tax burdens on Indian retailers and their wholesaler suppliers.[10]

This Court has recognized that what Indian retailers are able to offer "customers, and what is not available elsewhere, is solely an exemption from state taxation." *Id.*[11] Any such exemption puts non-Indian retailers in these markets at an enormous competitive disadvantage and deprives the citizens of States in which those markets are located of a significant source of government revenue. Indeed, the record in this case demonstrates that non-Indian retailers in the State of New York could be losing hundreds of millions of dollars in business to Indian retailers annually, and that the State of New York is losing more than $100 million in statutorily mandated sales tax revenue per year. Moreover, "[i]t is painfully apparent that the value marketed by [such Indian retailers] to persons coming from outside [the reservation] is not generated on the reservations by activities in which the Tribes have a significant interest." *Colville*, 447 U.S. at 155. There thus appears to be no basis on which a State's failure to impose taxes on such sales as it does on other sales within the State could be upheld under the more restrictive *Mancari* standard relied upon by the

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[10] Similarly, Native Americans will have no effective recourse for challenging laws and government policies which single them out for less-preferential treatment but that are not related to any unique Indian interest.

[11] In *Moe*, the Court recognized that where, as here, the legal incidence for the payment of a sales tax falls on the purchaser but collection efforts for such sales taxes must be asserted against product suppliers and retailers, "the Indian seller doing business on tribal land enjoys [a competitive advantage] over all other cigarette retailers" if the State's ability to assert such collection efforts "is dependent on the extent to which the non-Indian purchaser is willing to flout *his* obligation to pay the tax." *Moe*, 425 U.S. at 482 (emphasis in original).

Fifth, Eighth and Ninth Circuits and by the Supreme Courts of Maine and Vermont.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully urge this Court to grant this Petition for a Writ of Certiorari.

Respectfully Submitted,

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